

REMARKS

I. Status of the Claims

After amendment, claims 1, 4, 5, 7-26 and 28-39 are pending. Without prejudice or disclaimer, claims 2, 3, and 6 are canceled herein. Without prejudice or disclaimer, claims 1, 18, 24, and 25 are amended herein. Support for these amendments is provided in the original claims and as-filed specification. Accordingly, Applicants respectfully submit that no issue of written description is raised by these amendments

II. Examiner Interview

Applicants thank Supervisor Richter and Examiner Saroush for granting an in-person interview on August 5, 2009. The rejections under 35 U.S.C. § 102(b) and 35 U.S.C. § 103 were discussed. Briefly, it was agreed that an amendment to claim 1 to include "a physiologically acceptable gas mixture comprising 10 to 90% vol/vol carbon dioxide with the remaining gas oxygen" would overcome the rejections under 35 U.S.C. § 102(b). Further, the Examiner agreed that the prior art described in the Declarations submitted December 8, 2008 and May 1, 2008, are the proper closest prior art comparisons, thereby demonstrating unexpected results. Finally, the Examiner requested that Applicants submit color copies of the images from Figure 4 of Eckmann et al. (*Dermatol. Surg.*, 2005), originally submitted December 8, 2008. The substance of the interview is captured in this response.

III. Rejection Under 35 U.S.C. § 102

The Office rejected claims 1-4, 6-23, and 29-36 under 35 U.S.C. § 102(b) "as being anticipated by Osman et al. (International Application Published Under the PCT, Published 12/07/2000) [("*Osman*")]" as evidenced by Barry et al." See Office Action at page 3.

Applicants respectfully disagree, however, in order to advance prosecution, Applicants have amended claims 1 and 18. At the interview, "[i]t was agreed by the Examiner that such an amendment would overcome the 102(b) rejection of record." See Interview Summary, mailed August 10, 2009. The rejections under 35 U.S.C. §102(b) are therefore moot, and Applicants respectfully request their withdrawal.

IV. Rejection Under 35 U.S.C. § 103

The Office rejected claims 5, 24, 25, 26, and 28 under 35 U.S.C. §103(a) "as being unpatentable over Osman et al. . . . as evidenced by Barry et al." See Office Action at page 5. Additionally, the Office rejected claims 37-39 under 35 U.S.C. §103(a) "as being unpatentable over Osman et al. . . . as evidenced by Barry et al. . . . in view of Frullini et al." See *id.* at page 6.

Applicants respectfully disagree because the Office has failed to establish a *prima facie* case of obviousness for the reasons of record. However, "[i]t was agreed by the Examiner that the Declaration submitted 12/08/2008 is the closest prior art comparison." See Interview Summary mailed August 10, 2009, and therefore, even assuming that the claimed invention is *prima facie* obvious in view of *Osman*, the evidence of record demonstrates the patentability of the claimed invention. It is

unexpected that the claimed invention achieves a result not seen using the closest prior art foam, which has nitrogen levels of about 7%.

Specifically, even assuming that one would be led to pursue low nitrogen gas mixtures, when considering *Osman* as a whole, as a practical matter, the lowest nitrogen gas mixtures actually disclosed by *Osman* are about 7% nitrogen. For example, the procedure of Example 2 of *Osman*, results in a gas phase consisting of about 7% nitrogen. While the objective of this theoretical example is apparently to create a canister filled with 100% O₂, significant air contamination is likely in practice, and there is no teaching or suggestion in *Osman* that one of skill in the art would need to practice methods and take additional precautions that would reduce this contamination.

As explained by Applicants' representative during the interview on August 5, 2008, the 7% nitrogen foam of the prior art, referred to in the Eckmann study as Varisolve® Type A is made according to the procedure of *Osman*. See Declaration of David Wright (discussing *Eckmann et al.*, Dermatol. Surg., 2005), submitted December 8, 2008; see also *Eckmann et al.*, Figure 4 images, submitted December 8, 2008 (and resubmitted August 28, 2009 in color as requested by the Examiner).

In view of these remarks, "[i]t was agreed by the Examiner that the Declaration submitted 12/08/2008 is the closest prior art comparison." See Interview Summary mailed August 10, 2009. Therefore, Applicants have submitted a side-by-side comparison of a foam with the claimed range of nitrogen (0.01-0.8%) with the closest prior art foam of *Osman*, demonstrating the unexpected results of the instant foam.

Applicants have rebutted any *prima facie* case of obviousness. For at least the above reasons, Applicants respectfully request withdrawal of the rejections under 35 U.S.C. § 103.

Further, as requested by the Examiner, Applicants submit with this response, a Petition to Submit Color Drawing in Accordance with 37 C.F.R. §§ 1.84(a)(2) and (b)(2), the required fee, and three (3) color copies of *Eckmann et al.*, Figure 4 images that were originally submitted as grayscale images on December 8, 2008.

V. Conclusion

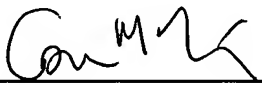

In view of the foregoing amendments and remarks, Applicants respectfully request reconsideration and timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

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By:  
Anthony C. Tridico
Reg. No. 45,958
Reg. No. 48,638